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10/694,198	10/27/2003	Dennis L. Keiser	KEISER.020A	3867

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KNOBBE MARTENS OLSON & BEAR LLP
2040 MAIN STREET
FOURTEENTH FLOOR
IRVINE, CA 92614

EXAMINER	
FOREMAN, JONATHAN M	
ART UNIT	PAPER NUMBER
3736	

NOTIFICATION DATE	DELIVERY MODE
02/04/2009	ELECTRONIC

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

jcartee@kmob.com
eOAPilot@kmob.com

Office Action Summary	Application No.	Applicant(s)	
	10/694,198	KEISER, DENNIS L.	
	Examiner	Art Unit	
	JONATHAN ML FOREMAN	3736	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE *3* MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *17 November 2008*.

2a)☒ This action is **FINAL**. 2b)☐ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1-9 and 13-15* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1-9 and 13-15* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☐ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☒ Information Disclosure Statement(s) (PTO/SB/08) Paper No(s)/Mail Date _____.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____ .
5) ☐ Notice of Informal Patent Application
6) ☐ Other: _____.

DETAILED ACTION

Information Disclosure Statement

1. The information disclosure statement filed 11/17/08 complies with the provisions of 37 CFR 1.97, 1.98 and MPEP § 609. It has been placed in the application file, and the information referred to therein has been considered by the examiner as to the merits.

Claim Rejections - 35 USC § 102

2. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

> A person shall be entitled to a patent unless –
>
> (e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

3. Claims 1, 2, 8, 9 and 13 - 15 are rejected under 35 U.S.C. 102(e) as being anticipated by U.S. Patent Application Publication No. 2002/0086774 to Warner.

In regard to claims 1, 2, 8, 9 and 13 - 15, Warner discloses initializing a resistance element to a first resistance level; moving an engagement assembly coupled to the resistance element at a highest achievable velocity through an exercise stroke; measuring a representative velocity at which the engagement assembly is moved through the exercise stroke and collecting data responsive to the representative velocity [0033][0035]; increasing the resistance level of the resistance element [0282]; repeating the acts of moving, measuring and increasing until sufficient data are collected; calculating power for each exercise stroke based on the resistance level for each exercise stroke and the representative velocity for each exercise stroke; generating an output that represents at least the measured velocity and calculated power for a plurality of exercise strokes (Figure 8c); and

determining a maximum power (600) for the muscle group [0307][0308]. Sufficient data is collected when the resistance level is incremented to a predetermined level. Sufficient data is collected when a predetermined number of exercises are completed. Power is calculated at the maximum resistance (Figure 8c). The resistance element provides a generally consistent resistance against movement of the engagement assembly throughout the exercise stroke. The velocity and resistance level where the maximum power is produced is determined in that all data for a workout session is recoded [0303]. The maximum velocity at which the engagement assembly is moved during a plurality of exercise strokes is determined in that all data for a workout session is recorded [0303].

Claim Rejections - 35 USC § 103

4. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

5. Claims 1, 5, 8 and 9 are rejected under 35 U.S.C. 103(a) as being unpatentable over U.S. Patent No. 6,672,157 to MacFarlane et al. in view of U.S. Patent No. 6,231,481 to Brock.

In regard to claims 1, 8 and 9, MacFarlane et al discloses a method of evaluating the power of a muscle group of a including initializing a resistance element to a first resistance level; moving an engagement assembly coupled to the resistance element at a highest achievable velocity through an exercise stroke; measuring a representative velocity at which the engagement assembly is moved through the exercise stroke and collecting data responsive to the representative velocity; increasing the resistance level of the resistance element; repeating the acts of moving, measuring and increasing until sufficient data are collected; calculating power for each exercise stroke based on the resistance

level for each exercise stroke and the representative velocity for each exercise stroke; and determining a maximum power for the muscle group (Col. 10, line 50 – Col. 11, line 67). MacFarlane et al teaches to stop the exercise stoke once a leg was tested three times, so this could be viewed as a predetermined number of exercise strokes. Also MacFarlane et al teaches to stop at a specific resistance level, so this could be viewed as a predetermined resistance level. MacFarlane fails to disclose generating an output that represents at least the measured velocity and calculated power for a plurality of exercise strokes. However, Brock teaches a method of evaluating the power of a muscle group including generating an output that represents at least the measured velocity and calculated power for a plurality of exercise strokes (Col. 4, lines 2 – 5; 54 – 62). It would have been obvious to one having ordinary skill in the art at the time the invention was made to include generating an output that represents at least the measured velocity and calculated power for a plurality of exercise strokes as taught by Brock with the method disclosed by MacFarlane et al. in order to assist a user in maximizing or optimizing his efforts (Col. 3, lines 18 – 19).

Regarding claim 5, MacFarlane et al. in view of Brock disclose giving the subjects a good 20 – 30 second rest between trials, but fails to disclose the time between the act of measuring increasing as the resistance level increases. However, it would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the method of MacFarlane et al. in view of Brock, with a step of allowing the user to rest for an increasing amount of time as the strain of the exercise increases before attempting a new resistance level, to allow for accurate and valid power testing results to be obtained.

6. Claim 7 is rejected under 35 U.S.C. 103(a) as being unpatentable over U.S. Patent Application Publication No. 2002/0086774 to Warner.

Regarding claim 7, it would have been obvious to one having ordinary skill in the art at the time the invention was made to provide a method step to Warner that included determination of sufficient data based on an exercise stroke not being completed because this prevents a valid power calculation to be determined because the distance completed by a full stroke is not the same for the uncompleted stroke.

7. Claim 3 is rejected under 35 U.S.C. 103(a) as being unpatentable over U.S. Patent Application Publication No. 2002/0086774 to Warner in view of U.S. Patent No. 4,846,466 to Stima III.

Warner discloses the claimed method except for the resistance element being a pneumatic cylinder. Stima, III teaches a resistance element that is a pneumatic cylinder (see Column 4, lines 22-42), which allows for the resistance of the weight-lifting machine to be increased or decreased fairly easily. It would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the method of Warner to include a pneumatic cylinder system as the resistance element, as taught by Stima, III, to allow for the resistance of the weight-lifting machine to be increased or decreased with relative ease.

8. Claim 4 is rejected under 35 U.S.C. 103(a) as being unpatentable over U.S. Patent Application Publication No. 2002/0086774 to Warner in view of U.S. Patent No.4,730,829 to Carlson.

Warner discloses the engagement assembly being a chest press [0274] but fails to disclose a first and second handgrip for the left and right hand of a subject, and the act of measuring being performed for each handgrip to provide an independent power measurement for each arm. Carlson teaches it is known to provide a measuring system for each side of the body and break/resistance mechanism for each side of the body on a chest press system (see Column 3, lines 24-38, see

columns 21-22, lines 45-10, also see Figure 1). Warner discloses measuring power using any piece of exercise equipment [0025]. It would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the device of Warner to include a first and second handgrip for the left and right hand of a subject coupled to a resistance element as taught by Carlson and to measure each arm independently because one side of the body maybe stronger than the other side.

9. Claim 6 is rejected under 35 U.S.C. 103(a) as being unpatentable over U.S. Patent Application Publication No. 2002/0086774 to Warner in view of U.S. Patent No. 4,846,466 to Stima III as applied to claim 3 above, and further in view of U.S. Patent No. 6,231,481 to Brock.

Warner in view of Stima III disclose the claimed invention except for determining velocity periodically measuring a position of a piston in a pneumatic cylinder. If the pneumatic cylinder is the means for providing resistance, it can also be considered as the weight portion as discussed in Brock. Brock teaches to provide a position transducer on the weight or resistance means to determine the distance traveled and then to calculate the power using the weight or resistance value and the velocity determined from the distance values (see Columns 3-7, lines 15-44). It would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the device and method of Warner in view of Stima III to include a position sensing means in the piston of a pneumatic cylinder, as taught by Brock, to determine the distance traveled of the resistance providing means and to then calculate the power using the weight or resistance value and the velocity determined from the distance values determined from the position transducer.

Response to Arguments

10. Applicant's arguments filed 11/17/08 have been fully considered but they are not persuasive. Applicant asserts that neither Warner nor MacFarlane disclose "moving an engagement assembly coupled to the resistance element at a highest achievable velocity through an exercise

stroke" and subsequently determining "a maximum power for the muscle group". Additionally, Applicant asserts that Warner teaches away from the claimed method. However, "[a]rguments that the alleged anticipatory prior art is nonanalogous art' or teaches away from the invention' or is not recognized as solving the problem solved by the claimed invention, [are] not germane' to a rejection under section 102." Twin Disc, Inc. v. United States, 231 USPQ 417, 424 (Cl. Ct. 1986) (quoting In re Self, 671 F.2d 1344, 213 USPQ 1, 7 (CCPA 1982)). A reference is no less anticipatory if, after disclosing the invention, the reference then disparages it. The question whether a reference "teaches away" from the invention is inapplicable to an anticipation analysis. Celeritas Technologies Ltd. v. Rockwell International Corp., 150 F.3d 1354, 1361, 47 USPQ2d 1516, 1522-23 (Fed. Cir. 1998). The Examiner considers both Warner and MacFarlane to disclose "moving an engagement assembly coupled to the resistance element at a highest achievable velocity through an exercise stroke" and subsequently determining "a maximum power for the muscle group" (see above). The Examiner considers the highest velocity recorded during the exercise set to be the highest achievable velocity through an exercise stroke in that it was the highest velocity achieved. The maximum power calculated is "a maximum power for the muscle group". It is also noted, that under the principles of inherency, if a prior art device, in its normal and usual operation, would necessarily perform the method claimed, then the method claimed will be considered to be anticipated by the prior art device. In re King, 801 F.2d 1324, 231 USPQ 136 (Fed. Cir. 1986).

Conclusion

11. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the

mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to JONATHAN ML FOREMAN whose telephone number is (571)272-4724. The examiner can normally be reached on Monday - Friday 8:00 am - 4:30 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Max Hindenburg can be reached on (571)272-4726. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/J. M. F./
Examiner, Art Unit 3736

/Max Hindenburg/

Supervisory Patent Examiner, Art Unit 3736